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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD OF THE 687th MEETING

Held at Headquarters, New York,
on Monday, 19 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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00-48826 (E)

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The meeting was called to order at 3.10 p.m.

ELECTION OF OFFICERS (continued)

1. Mr. FERRARI (Italy) nominated Mr. Morán Bovio (Spain) for the office of Rapporteur.

2. Mr. RENGER (Germany), Mr. MARADIAGA (Honduras) and Ms. POSTELNICESCU (Romania) seconded the nomination.

3. Mr. Morán Bovio (Spain) was elected Rapporteur by acclamation.

4. Mr. HERRMANN (Secretary of the Commission) said that, since the Chairman and Rapporteur had been drawn, respectively, from the Groups of Asian and Western European and other States, the Groups of Latin American and Caribbean, African and Eastern European States should hold consultations and nominate the three Vice-Chairmen.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470 and 472 and Add.1-4; A/CN.9/XXXIII/CRP.4)

5. The CHAIRMAN recalled that there had been strong support at the previous meeting for the deletion of original article 4 (2) of the draft Convention, which corresponded to square-bracketed article 4 (3) in the draft report of the ad hoc group introduced at that same meeting.

6. Mr. MARADIAGA (Honduras) said that he supported the statements made by the Spanish and French representatives at the previous meeting, since the main goal of the draft Convention was to unify law.

7. Ms. GAVRILESCU (Romania), Ms. MANGKLATANAKUL (Thailand) and Mr. WHITELEY (United Kingdom) said that their delegations were not yet ready to support deletion and suggested that a decision on the matter should be deferred until the issue of the exclusion of receivables arising from real estate transactions had been discussed.

8. The CHAIRMAN accordingly invited the Commission to resume consideration of a definition of interbank payment systems to be included under a revised article 6. The European Banking Federation (EBF) had drafted an article 6 (m) defining the term "payments or securities settlement system" as any contractual arrangement between three or more participants (A/CN.9/472/Add.1, p. 12). It would be recalled that the Commission, in connection with its consideration of the report of the ad hoc group concerning exclusions under article 4, had decided that the draft Convention should not apply to receivables arising under interbank payment systems or investment securities settlement systems.

9. Mr. DESCHAMPS (Observer for Canada) asked why a definition of interbank payment systems was needed.

10. Mr. DUCAROIR (European Banking Federation (EBF)) said that the concept of interbank payment systems had already been defined for the member countries of

the European Union in a recent EEC glossary directive. After much controversy, it had been decided to confine the definition of interbank payments to arrangements involving three or more participants. Unless the term "interbank payments" was defined, it might be interpreted differently by the various States, according to their practice, which might, for instance, include bilateral correspondent banking.

11. Mr. SMITH (United States of America) said that there were two issues: whether there should be a definition at all; and if so, what the definition should be. The United States was perfectly content not to have a definition, but if the Commission felt it was required, his delegation believed that it should refer to two or more participants rather than three or more. The United States was familiar with two-bank payment systems, either between two banks in the same location which agreed that their debits and credits would be combined, or between a central bank branch and an individual bank. If the criterion was three or more participants, the exclusion of receivables arising from such payments would be too narrow

12. The CHAIRMAN asked whether, without a definition, the proposed exclusion of receivables arising under interbank payments systems or investment securities settlement systems (draft article 4 (2) (d) in the report of the ad hoc group would be clear to all.

13. Mr. SMITH (United States of America) said he thought that it would. The fact that the European Union had adopted a narrower definition for the purposes of European Union community law did not mean that the draft Convention had to follow suit. The commentary to the relevant article could make it clear that the Convention definition was broader than that in European Union law.

14. Mr. DUCAROIR (European Banking Federation (EBF)) said that he would support the United States position since the matter was not of major concern. A clarification in the commentary to the draft Convention would, however, be welcome.

15. Mr. RENGER (Germany) said that the matter was of concern to his delegation. Its understanding was that interbank payments always involved three or more participants. If the Convention introduced two different definitions for a term which by law already had an established meaning in Europe, the European Union countries would find it hard to adopt the Convention.

16. Mr. SMITH (United States of America) said that often terms used in international conventions were defined differently in national law. The search for common formulations made that unavoidable. The purpose of the term used by the ad hoc group in the text of the Convention might well be different from that of the term used to define an interbank payment system in a European Council directive. He guessed that for the European Union it meant a system where payments were regulated under certain rules among banks and where the concerns were the solvency and systemic risk of the overall banking system. In the Convention, however, it was used merely to exclude assignment of the receivable in question, and the exclusion had been proposed merely because a payment owed by one bank to another was not usually the type of receivable the Convention was designed to address. In many countries, payments between even two banks were

subject to other areas of the law, where the Convention was not needed. Bearing in mind those totally different purposes for using the term, it did not seem a problem to the United States to propose exclusion of payments owed by one bank to another if one viewed that as an interbank payment system.

17. Mr. MORÁN BOVIO (Spain) observed that in Europe the system required three or more participants; yet the concrete relationship of the payment was usually bilateral. Since the matter was very technical and could have different interpretations under different legal systems, he supported the position just taken by the European Banking Federation, that it should be left to the commentary to make it clear that the European Union definition was one of several possible ones and explaining what precisely was being excluded from the Convention.

18. Mr. SMITH (United States of America) said that there would be no problem in including the EBF definition in the commentary as one of the systems covered by the term "interbank payment system".

19. Mr. RENGER (Germany) said that his delegation accepted the Spanish suggestion.

20. Mr. HERRMANN (Secretary of the Commission) cautioned against counting on the commentary as an escape hatch by referring all disputed questions to it. There was some question as to whether the final text would include a commentary at all. Draft conventions referred to the General Assembly normally did not, whereas those referred to a diplomatic conference for adoption usually did. Moreover, in the case of the absolutely final text adopted by a conference, the practice had been to consider the commentary official only if the Commission or the conference had approved the text of it as such. In cases where the Commission had asked the General Assembly to act as or in lieu of a diplomatic conference, however, it had not necessarily always prepared a commentary. A further possibility would be to invite the Commission secretariat, together with a few experts, to prepare a commentary after the fact, based on the final text of the Convention, but the degree of authority such a commentary would have remained to be determined.

21. The CHAIRMAN observed that, in any case, the decision had been made not to include the EBF definition of interbank payments in the text of the Convention itself.

22. Mr. COHEN (United States of America) said that the proposed exclusion in article 4 (1) (b) dealt with assignments of a negotiable instrument. A negotiable instrument as a materialized right was treated as a thing and, in many respects, the law of the State in which the negotiable instrument was located was considered to be the law that would govern that right. More generally, as a materialized right, the negotiable instrument was often considered to be different from a mere receivable. While most cases involving negotiable instruments would involve delivery and all necessary endorsements, there were some cases in which delivery was made without endorsement and even some in which the agreement to assign was made without actual delivery. In all such cases, the right of the assignee with respect to the negotiable instrument should not be governed by the Convention. The ad hoc group consisting of

representatives of the United States and Germany and the observer for EUROPAFACTORING had therefore proposed that article 4 (1) (b) should simply read "Of a negotiable instrument".

23. Mr. DESCHAMPS (Observer for Canada) said that the Commission should have time to consider the implications of the proposal and make sure that the new wording did not lead to more exclusions than those intended.

24. Mr. STOUFFLET (France) said that his delegation was in favour of retaining the text of article 4 (1) (b) as originally drafted.

25. Mr. RENGER (Germany) said that his delegation agreed in principle with the proposal of the United States delegation. In many cases, negotiable instruments were transferred without endorsement. The use of the words "To the extent made by [through] a negotiable instrument" would be more appropriate. Under German law, the delivery of a negotiable instrument based on a contract was regarded not as an assignment but rather as a transfer of rights, as in the case of the transfer of goods. Therefore, if the wording proposed by the United States delegation was accepted, the Commission should consider amending the chapeau of article 4 (1) to read: "This Convention does not apply to the transfer of rights" or "This Convention does not apply to assignments and/or the transfer of rights".

26. Mr. DOYLE (Observer for Ireland) said that his delegation was in favour of retaining the original text of article 4 (1) (b). The text had been arrived at after many sessions of the Working Group on International Contract Practices and, in view of the Commission's heavy workload, it was not wise to begin making amendments that did not necessarily improve the text. Moreover, it was difficult for the Commission to assess the ramifications of amendments proposed at such short notice.

27. Mr. MORÁN BOVIO (Spain) said that perhaps the amendment proposed by the United States of America was much broader in scope than might appear at first glance. If the requirement of endorsement and delivery was removed from article 4 (1) (b), the scope of the exclusion would surely be much broader.

28. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Working Group had decided to refer to "assignments" in article 4 (1) (b) in order to reflect the meaning of "assignment" as defined in article 2. The reference to "delivery of a negotiable instrument" or "delivery and endorsement" had been intended to reflect the focus on the means by which the negotiable instrument was transferred instead of on the type of the receivable involved, since different legal systems might have a different understanding of a negotiable instrument or a documentary receivable. The words "To the extent made" were meant to reflect the idea that, if the same receivable that existed in the form of a negotiable instrument also existed under a contract and the receivable under the contract was assigned, that assignment should not be excluded.

29. Mr. COHEN (United States of America) said that, in the majority of transactions in which negotiable instruments were assigned, the instruments were assigned with delivery and any necessary endorsement. Therefore, the deletions

proposed by his delegation would not dramatically expand the scope of the exclusion but would ensure that it applied in some very important contexts. For example, if an assignor located in the United States of America under the location rules of the Convention owned and possessed a negotiable instrument in France and assigned that negotiable instrument to a person in France but neglected to endorse the instrument, under the Convention the law of the United States would determine priority because the assignor was located in the United States. While that might be an acceptable rule for tangible rights, it was inconsistent with the general understanding in many States regarding rights to intangible things, such as negotiable instruments. While most negotiable instruments were transferred by delivery with endorsement, in some contexts endorsements were not made, such as in interbank mortgage transfers and, in some cases, transfer was even made without delivery. While that was only one small corner of the negotiable instruments market, his delegation believed that the Convention should deal appropriately - or not at all - with that small corner. The deletions proposed in article 4 (1) (b) would remove the language that prevented the exclusion from applying to such assignments.

30. Ms. McMILLAN (United Kingdom) said that her delegation could support the United States proposal since nothing would be lost by deleting the words "To the extent made by the delivery" and "with any necessary endorsement".

31. Mr. DESCHAMPS (Observer for Canada) said that, if the United States proposal was accepted, the assignment of a negotiable instrument would be excluded from the scope of application of the Convention even if there was no negotiation and even if there was no delivery of the instrument. The United States representative had given an example of an assignment made with delivery. Canada was concerned that the exclusion from the Convention of an assignment without negotiation or without delivery might have unintended consequences. The Commission should therefore have more time to consider all the implications of the proposal.

32. The CHAIRMAN said that he would give the Commission more time to study the proposal, which would be taken up again at a subsequent meeting. He invited the Commission to consider article 7 of the draft Convention.

33. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the purpose of article 7 was to recognize the right of parties to derogate from or change by agreement provisions of the Convention relating to their rights as long as the rights of persons not parties to the agreement remained unaffected. The Working Group believed that such an approach was necessary because an agreement under the Convention could affect parties other than the parties to that agreement. For example, an agreement between the assignor and the debtor could affect the assignee, and an agreement between the assignee and the assignor could affect the debtor. The Working Group also believed that the concept reflected in article 7 was in keeping with the general notion of party autonomy, which meant that parties could change their agreement as long as they did not affect the rights of third parties.

34. Under article 21 of the draft Convention, waivers of defences between the assignor and the debtor restricted party autonomy in that such a waiver required a document signed by the debtor so that the debtor was aware of the rights that

he was waiving and the consequences of the waiver. The Working Group had decided that, for public policy reasons, certain rights reflected in article 21 (2) should not be subject to a waiver; such rights arose from fraudulent acts on the part of the assignee or defences based on the debtor's incapacity. In the light of that limitation to party autonomy, the Commission might wish to state in article 7 that the rule contained in article 7 was subject to article 21 (2).

35. In considering article 7, the Commission had to decide whether or not agreements between the assignee, the new creditor and the debtor were covered by that article. It was also necessary to clarify whether or not article 7 applied to agreements between the assignee and the debtor to waive the rights of the debtor; that matter could be dealt with in the commentary, as long as the Commission reached an understanding on the subject.

The meeting was suspended at 4.25 p.m and resumed at 5 p.m.

36. The CHAIRMAN invited the Commission to consider article 7 of the draft Convention dealing with party autonomy. He noted that the Secretariat, in its commentary (A/CN.9/470), had raised the issue of consistency between article 7 and article 21 and the need to include a specific reference to an agreement between the assignee and the debtor, either in the text of article 7 or in the commentary or report.

37. Mr. MORÁN BOVIO (Spain) said that his delegation felt that a reference to relations between the debtor and the assignee was desirable and should be introduced into the text of article 7 itself. Such a provision would enhance the possibility that, once a debtor received notification of assignment, it could reach an agreement with the assignee, if the parties so desired.

38. Mr. FERRARI (Italy) noted that the wording of article 7 differed from provisions on party autonomy in many other recent commercial law conventions, notably from article 6 of the United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980, which allowed the parties to opt out of the Convention entirely. That Convention, of course, dealt with two-party transactions, whereas an assignment necessary implied the existence of three parties.

39. Perhaps article 3 of the UNIDROIT Convention on International Factoring, Ottawa, 1988, which dealt with exclusion of the Convention, would be a more appropriate model. It might be useful to allow the parties to exclude the draft Convention, that is, to opt out of it entirely, with, of course, some limitations. They should not, for example, be allowed to derogate from the draft Convention in such a way as to affect the rights of third parties and exclude them from the draft Convention.

40. There were a few other issues that needed clarification. His delegation felt that there were potential problems with the assignor-debtor relationship. Paragraph 75 of the commentary (A/CN.9/470) referred to the possibility that the parties might derogate from the draft Convention by referring to the law of a non-Contracting State or to the domestic law of a Contracting State, but he did not believe that that would actually result in exclusion.

41. With regard to the debtor-assignee relationship, his delegation felt that, if article 7 was left as it stood, it would allow the debtor and the assignee to conclude an agreement excluding the draft Convention, subject to the limitations mentioned in the commentary.

42. Mr. TELL (France) said that, because of the close relationship between the two articles, article 7 should begin with the standard proviso "Without prejudice to the provisions of article 21". He would like to remind the Commission that the Working Group had made the decision not to exclude assignments of consumer receivables or assignment to consumers, as a general rule. Nevertheless, in many countries, consumers were protected by mandatory national law provisions, as was recalled in article 21. He agreed with the Italian representative that the present wording of article 7 would allow a debtor to conclude an agreement with an assignee derogating from the provisions of the draft Convention, a result inconsistent with the provisions of article 21.

43. Without taking a position, for the moment, on the inclusion of a specific reference in article 7 to an agreement between a debtor and an assignee, as suggested by the representative of Spain, he would merely point out that any such agreement would have to be without prejudice to mandatory law provisions preventing certain classes of debtors from waiving certain rights or defences, and not only those mentioned in article 21.

44. Mr. DOYLE (Observer for Ireland), supported by Mr. BURMAN (United States of America), said he thought that it was too late to take an entirely new approach to article 7. The question raised in paragraph 75 of the commentary (A/CN.9/470) whether article 7 should apply to derogating agreements between the debtor and the assignee had been answered in paragraph 150 of the commentary, which noted that the Working Group had assumed that agreements between assignees and debtors were outside the scope of the draft Convention. If that was the case, then article 7 did not cover such agreements, and there was no need to mention them. Article 7 could stand as currently worded.

45. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that he apologized for any ambiguity in the commentary between paragraphs 75 and 150. It should be borne in mind that, while article 7 and its commentary dealt with any derogating agreements between the parties, article 21 and its commentary dealt with the narrower issue of waivers of defences. What paragraph 150 did make clear was that agreements between the debtor and the assignee whereby the debtor waived certain defences were considered to be outside the scope of the draft Convention and were not covered by article 21. Assuming that such was the correct interpretation, article 7 should be made consistent with it.

46. Mr. FERRARI (Italy) said that there did seem to be a policy difference, since some delegations obviously felt that debtor-assignee agreements should not be covered by the draft Convention at all, whereas his delegation felt that they should be covered except for the waivers of defences mentioned in article 21 (2). Certainly that was the conclusion one must draw from the present wording of article 7, which mentioned the assignor, the assignee and the debtor without drawing distinctions.

47. The CHAIRMAN suggested that the matter of reconciling the two articles, including a proviso along the lines proposed by the French representative, should be left, for the time being, to the drafting group, and the Commission should move on to consideration of article 8 of the draft Convention dealing with principles of interpretation.

48 Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the wording of article 8 had been modelled on similar provisions in other UNCITRAL texts and other international conventions. Paragraph 1 stressed the international character of the draft Convention and the need for uniformity in its application and good faith in international trade. Paragraph 2 addressed the question of matters governed by the draft Convention which were not expressly settled in it and stated that they were to be settled in conformity with its general principles or, in the absence of such principles, in conformity with the rules of private international law.

49. Mr. FERRARI (Italy) said that his delegation supported the policy underlying the article but would like to suggest some modifications. With regard to paragraph 1, the principles contained in the preamble to the draft Convention should be mentioned either in the text itself or in the commentary or report.

50. There was a larger problem with paragraph 2, which could be taken up in conjunction with the consideration of chapter V on conflict of laws. His delegation agreed with the wording as it stood, but not if it was to be extended to chapter V as well. In relation to chapter V, the draft Convention should not allow the creation of private international law by judges. His delegation therefore proposed an amendment to article 8 (2) specifying that it did not extend to chapter V. The amendment could be left in brackets until it was determined whether or not the draft Convention would include chapter V.

51. It might be helpful in the report actually to list the general principles referred to. His delegation, for example, did not consider party autonomy to be one of those principles, whereas it certainly included adequate debtor protection among them.

52. Mr. BURMAN (United States of America) said that his delegation agreed with the Italian proposal regarding article 8 (1). It was important to make specific mention of the preamble, so that other parties who had not been closely involved in the elaboration of the draft Convention would realize its importance for interpretation.

53. Regarding article 8 (2), he shared the concerns expressed by the representative of Italy. There was a need for an amendment stating explicitly that, where a matter governed by the Convention was not expressly settled by it or by the general principles on which it was based, the law applicable as determined by the draft Convention should first be applied and then, as necessary, the law applicable through the general conflicts rules of the jurisdiction concerned. That point could of course be made in the commentary, although the Commission would have to take a decision on the type of commentary it wished to include before deciding whether such a solution would be

acceptable. The Commission might want to return to article 8 (2) when it considered chapter V.

54. Ms. KESSEDJIAN (Observer for the Hague Conference on Private International Law) said that, if the provision in question remained as currently drafted, judges charged with its application would refer first to domestic rules of private international law. If those rules led them to apply the law of a State party, they would then refer to the rules of the Convention itself, and, only under those circumstances, would the provisions of chapter V be applied. The Commission must exclude chapter V from the scope of article 8 (2) if indeed it decided to retain that chapter.

55. Mr. Al-NASSER (Observer for Saudi Arabia) said that his delegation agreed that article 8 (2) appeared to call on judges to refer first to domestic rules of private international law.

56. Mr. FERRARI (Italy) pointed out that, in accordance with article 1 (3), the provisions of chapter V applied to assignments of international receivables and to international assignments of receivables as defined in that chapter independently of whether the requirements in article 1 (1) and (2) were met. That being the case, judges should refer directly to the provisions of chapter V, before having recourse to national rules of private international law. However, he agreed that there was a need to distinguish clearly in every instance between the two concepts of private international law provided for in the Convention.

57. Ms. McMILLAN (United Kingdom) said that for those States which, like the United Kingdom, intended to exercise their right under article 37 to opt out of chapter V, the wording of article 8 (2) presented no difficulties.

58. Ms. WALSH (Observer for Canada), noting that Canada also intended to make the declaration under article 37, said that, as she understood it, if a forum State opted out of chapter V, the appropriate rules of international law would be those applicable in that State, whereas, if it did not do so, the appropriate rules would be those contained in chapter V.

59. Regarding the proposed inclusion in article 8 (1) of a reference to the preamble, which her delegation supported in principle, it might be prudent to defer a decision on the matter until the wording of the preamble itself had been finalized.

60. Mr. TELL (France) said that his delegation wished to associate itself with the views expressed by the representative of the United Kingdom and the observer for Canada concerning article 8 (2). The problem with the wording was that it assumed that chapter V applied, whereas it was in fact an optional chapter.

61. The CHAIRMAN suggested that the Commission should revert to article 8 (2) when it took up chapter V. As to article 8 (1), one of the fundamental principles of interpretation was that the preamble of any document was intended to assist in its interpretation. However, if the Commission so wished, he would request the drafting group to consider the proposal to include in article 8 (1) a reference to the preamble of the draft Convention.

62. Mr. FERRARI (Italy) said that article 8 (1) must refer specifically to the preamble as one of the elements to be taken into account in interpreting the Convention. The wording of article 4 (1) of the Ottawa Convention might serve as a model.

63. The CHAIRMAN invited the Commission to consider articles 9 and 10 on effectiveness of bulk assignments, assignments of future receivables and partial assignments, and time of assignment respectively.

64. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that he wished to highlight a number of problems with respect to the form of an assignment raised in the analytical commentary to the draft Convention (A/CN.9/470, paras. 80-82). Matters of formal validity were not dealt with in the draft Convention and, while certain matters of material validity were settled in it, others were referred to the law of the assignor's location. As a result, an assignee, in order to establish priority, would first have to establish the formal validity of the assignment. The draft Convention, however, gave no indication as to what law would govern formal validity. The assignee would then have to establish that the assignment was effective between himself and the assignor and, lastly, that he had priority under the law of the assignor's location.

65. There was a need to address those problems in order to simplify the position of assignees. The Working Group, however, had been unable to reach consensus on either a substantive law rule or a private international law rule that would resolve the issue of formal validity. The Commission might wish to include in the draft Convention an applicable law rule dealing with the formal validity of the transfer of proprietary rights in the receivable and to subject that limited issue to the law of the assignor's location, or to establish a "safe harbour" rule to the effect that an assignment was effective if it met at least the form requirements of the law of the State in which the assignor was located.

66. Mr. MORÁN BOVIO (Spain) said that a "safe harbour" rule would represent a most satisfactory solution to the problem of formal validity since it would also address many of the thorny issues raised in paragraph 81 of the commentary. He also welcomed the proposals made in paragraphs 85, 88 and 95.

The meeting rose at 6 p.m.

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Thirty-third session

SUMMARY RECORD OF THE 688th MEETING

Held at Headquarters, New York,
on Tuesday, 20 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

CONTENTS

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

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The meeting was called to order at 10.05 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, A/CN.9/470, A/CN.9/472 and Add.1-4)

1. The CHAIRMAN invited the Commission to consider the issue of the form of assignment and noted that some delegations had expressed support for the Secretariat proposal concerning a "safe harbour" rule (A/CN.9/470, para. 82).

2. Mr. KUHN (Observer for Switzerland) said that the form of assignment must be addressed in the draft Convention. National legal systems varied in their requirements in that regard; conflict-of-law rules were sometimes lacking or difficult to apply; and the draft Convention must not be open to the interpretation that all assignments, regardless of form, were valid.

3. He therefore welcomed the proposed "safe harbour" rule, which would leave in place the substantive law and private international law rules of States parties; however, the wording suggested by the Secretariat could be improved.

4. Mr. BRINK (Observer for EUROPAFACTORING) reminded the Commission that the objective was to validate as many assignments as possible; any uncertainty could lead to an escalation of costs. As the Working Group had been unable to reach consensus on a substantive law rule, he was in favour of the solution proposed by the Secretariat.

5. Mr. DOYLE (Observer for Ireland) said that he supported the proposed "safe harbour" rule for the reasons set forth by the previous speakers.

6. Mr. SALINGER (Observer for Factors Chain International) said that any substantive law rule establishing a written form requirement would destroy the usefulness of the draft Convention to the United Kingdom, and doubtless to many other countries as well, since such assignments were subject to a high stamp duty that would make international factoring uneconomical.

7. Ms. WALSH (Observer for Canada) said that, while she supported the proposal for a "safe harbour" rule, she agreed with the observer for Switzerland that the wording of the draft did not cover all potential problems. In particular, the term "form requirements" might not be broad enough. It might be better to include a stronger reference to the law of the State in which the assignor was located, particularly in the case of assignments effective against third parties. Also, it was important to capture the distinction between the concept of assignment itself and the form requirements for contractive assignment; the latter constituted a vehicle for the transfer of proprietary interests, and some legislations stipulated that they should be submitted in written form or registered publicly.

8. Mr. COHEN (United States of America) said that he did not share the previous speakers' enthusiasm for the idea of including the form of assignment in the draft Convention. Bilateral contracts between assignor and assignee entailed a number of issues which were not dealt with in that instrument and which the Commission had not previously expressed the desire to address.

9. As the observer for Canada had noted, if the issue was raised it must be handled well, whether through a substantive law rule or a "safe harbour" rule; unless carefully drafted, even the latter might lead to the inference that the law of the State in which the assignor was located invariably prevailed. If the Commission was determined to include such a provision, he would prefer as flexible an approach as possible and was therefore prepared to agree to a "safe harbour" rule.

10. Mr. FERRARI (Italy) said that he disagreed with the United States representative; it went without saying that any rule established in the draft Convention must be a good one. In reply to the objection raised by the observer for Factors Chain International, he noted that, like the United Kingdom, Italy imposed a heavy stamp duty on written transactions. However, that did not prevent the Commission from establishing a substantive rule, since in such a case domestic regulations would not apply. Nevertheless, he was in favour of the "safe harbour" rule proposed by the Secretariat.

11. Mr. SCHNEIDER (Germany) said that, since the Commission was unlikely to reach consensus on a substantive law rule, his delegation was in favour of the Secretariat proposal. However, the italicized words "at least" (A/CN.9/470, para. 82) were unclear and should be deleted. Furthermore, there could be serious repercussions if the words "the State in which the assignor is located" were taken to mean the assignor's place of central administration, which might be in a different State. That problem must be resolved.

12. Mr. DOYLE (Observer for Ireland) agreed with the representative of Germany, that, since the Commission had failed to reach consensus on a substantive law rule, a "safe harbour" rule was the best option. He had no objection to the wording proposed by the Secretariat; a rule based on location might not be ideal, but no better solution had been found. He asked the Secretariat to explain the words "at least".

13. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the words "at least" had been included to ensure that an assignment was effective if it met the form requirements of the law of the State in which the assignor was located, even if it was not valid under the national legislation of another of the States concerned.

14. Mr. FERRARI (Italy) said that he had interpreted the proposal to mean that, even if the form requirements established under domestic law were met, an assignment would not be effective unless it met those of the State in which the assignor was located. Obviously, the statement must be reworded.

15. Mr. HERRMANN (Secretary of the Commission) referred the Commission to the analytical commentary provided by the Secretariat. The proposal was in line with the modern trend in private international law on validity, which was to give several options. Thus, the intent had not been to establish the law of the State in which the assignor was located as a minimum requirement, but rather to create as liberal a regime as possible by adding another option for meeting the standard of effectiveness.

16. Mr. COHEN (United States of America) said that he was prepared to accept the proposal as interpreted by the Secretary of the Commission, subject to its being redrafted for clarity. However, the Working Group had not discussed the term "form", which might not have the same meaning under all national legislations. He assumed that the term included the question whether a written signature was required and, if so, whether electronic signatures were acceptable; however, it also raised issues such as the need for notarial seals, witnesses, notification of third parties, paper size and colour and location of ribbons.

17. Ms. KESSEDJIAN (Observer for the Hague Conference on Private International Law) said that the concerns expressed by the Commission were directly linked to articles 9 and 12 of the 1980 Rome Convention. She did not think that requirements for the effectiveness of assignment as against third parties had ever been considered criteria for formal validity within the meaning of article 9 of that instrument. Her own view was that, for States which interpreted article 12 of the Rome Convention as covering the effectiveness of assignment, article 9 would be deemed to apply to the form of such assignment; however, for States which considered that article 12 did not deal with that issue, it followed that article 9 would not apply.

18. If the Secretariat proposal to establish a rule of private international law was adopted, it would be best not to be too specific, to clearly define the term "form" in the draft Convention and to include a limited number of options rather than leaving the draft instrument open to a broad range of interpretations.

19. Mr. STOUFFLET (France) supported the proposed "safe harbour" rule, which would add another option to those provided under international private law.

20. With regard to the issues raised by the observer for the Hague Conference, his delegation considered that the effectiveness of an assignment as against third parties should be dealt with solely as an issue of form since it was already covered in other articles of the draft Convention.

21. Mr. KUHN (Observer for Switzerland) suggested that the words "without prejudice to private international law rules outside of the Convention" should be added to the Secretariat proposal. The advantage of the "safe harbour" rule was that it made form requirements subject to the same law - that of the State in which the assignor was located - as articles 24 and 28 (2) of the draft Convention, thereby obviating the need for a clear distinction between form and substance.

22. Mr. IKEDA (Japan) stressed the importance of providing evidence for assignment, whether in written or electronic form. His own country operated a system for establishing priorities, but under the draft Convention, according to the annex to article 3, priority was to be determined on the basis of the date of the contract of assignment. If that provision was retained - and his delegation would prefer that it should not be - it was hard to see how the time of assignment could be proved. There was a danger of fraudulent collusion if a contract was purely oral.

23. Mr. MORÁN BOVIO (Spain) pointed out that many of the concerns raised went beyond the scope of the "safe harbour" rule, which dealt with the specific issue of what form requirements were effective as against third parties. For that purpose, the wording suggested in document A/CN.9/470, paragraph 82, was entirely adequate. He could accept the deletion of the phrase "as against third parties", although he would prefer to retain it; it had the merit of indicating that, once the necessary formalities had been met, they were applicable to all parties.

24. Mr. DOYLE (Observer for Ireland) was also able to accept any of the proposed oral amendments, but thought that there was no point in entering into a long academic debate on interpretation. The Commission should adopt the "safe harbour" rule, along the lines suggested by the Secretariat.

25. Mr. BRINK (Observer for EUROPAFACTORING) said that there seemed to be overwhelming support for a "safe harbour" rule which would operate without prejudice to any other private international law. It should be left to the drafting group to produce the best wording. The question of opposability, mentioned by the representative of France, need not be included. Further thought should, however, be given to the difficult matter of location, which impinged on many of the other issues to be settled.

26. Ms. WALSH (Observer for Canada) suggested an alternative wording for the "safe harbour" rule that would allow the application of other rules of private international law to establish validity but would confirm that, if the requirements were complied with, the assignment was valid. The text should read: "An assignment shall be considered formally valid if it meets the formal requirements of the law of the State in which the assignor is located." As the representative of Spain had said, there was no need to distinguish between validity between assignor and assignee and validity against third parties.

27. The CHAIRMAN pointed out that the assignor's location was only one criterion. Other laws might apply to the transaction and it was enough to meet the requirements under any one of them for an assignment to be valid.

28. Mr. HERRMANN (Secretary of the Commission) said that, if the phrase "shall be considered" in the Canadian amendment was intended to indicate a non-exclusive choice of laws, it was too subtle. The issue might be clarified by adding the phrase "or the requirements of the law which determines formal validity according to another applicable rule of private international law". He endorsed, however, the view that further changes should be left to the drafting group.

29. Ms. GAVRILESCU (Romania) concurred. There was clearly general support for the proposal, which should be given its final wording by the Drafting Group. She also noted that, once the Commission had decided that the law of the State in which the assignor was located was applicable, it followed that questions of substance as well as form would be determined under the same law.

30. Mr. MARADIAGA (Honduras) drew attention to paragraph 108 of document A/CN.9/470. When read in conjunction with paragraph 82, it strengthened the

case for a "safe harbour" rule and, indeed, gave more force to the draft Convention as a whole.

31. Mr. FERRARI (Italy) said that the Canadian amendment did not provide enough openings for other applicable legislation. A possible solution lay in the way that the Commission had dealt with a similar situation relating to debtors, in article 19, paragraph 6. On that basis, he suggested the following text: "Without prejudice to the formal validity of the assignment on the grounds of any other applicable law, an assignment is effective if it meets the form requirements of the law of the State in which the assignor is located." Paragraph 142 provided a useful commentary on article 19, paragraph 6, and by extension on his proposed amendment.

32. Ms. WALSH (Observer for Canada) suggested that the word "effective" should be replaced by the words "formally valid". The meaning of "effective" was extremely broad; the point should be made that the reference was solely to the validity of the assignment.

33. Mr. FERRARI (Italy) said that he had put forward his amendment with an eye to the Canadian amendment, but the suggested change constituted a further improvement.

34. Ms. GAVRILESCU (Romania) supported the Italian amendment, as subamended by the observer for Canada, since it sought to deal with the concerns that her delegation and others had expressed.

35. Ms. McMILLAN (United Kingdom) suggested a further subamendment: the words "if any" could be inserted after the word "requirements". She also suggested that the word "formal" in the first phrase should be deleted, as being otiose.

36. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the discussion highlighted the need to leave the wording to the drafting group. The expression "without prejudice" had a different meaning in different languages and should be used with caution. Sometimes it almost amounted to the same as "subject to". Indeed, no caveat at all was needed: private international law often offered options but, whichever law was applicable in a given situation, the validity of the assignment remained the same.

37. Mr. SALINGER (Observer for Factors Chain International) expressed bemusement at what seemed an academic debate. It would surely be peculiar if, in relation to the formality of an assignment, rules stricter than those obtaining in the country of the assignor were adopted. Yet under article 24 an assignment was given effect if it accorded with the law of the assignor. It therefore seemed that, as the United States delegation had suggested, no rule was needed at all.

38. The CHAIRMAN said that the "safe harbour" rule had met with firm support and the drafting group should take on its task on that understanding. He encouraged interested delegations, either within the ad hoc group or individually, to submit any further suggestions to the drafting group.

Articles 9 and 10

39. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that articles 9 and 10 should be considered in tandem. Article 9 validated assignments of receivables that otherwise were not specifically identified: bulk assignments, assignments of future receivables and partial assignments. Paragraph (1) (b) made no requirement for specific identification of receivables, but they had to be identified as receivables to which the assignment related. Paragraph (2) related to master agreements, with the intention of ensuring that there was no need for a new document with each assignment. He drew particular attention to two aspects of article 9. First, as stated in document A/CN.9/470, paragraph 84, there was no question of the draft Convention overriding statutory limitations in such areas as wages, pensions, real estate receivables, sovereign receivables and many others. The only exceptions were those limitations which sought to invalidate future receivables or bulk receivables as such. The Working Group had therefore suggested the introduction of a new provision on statutory limitations, as reproduced in paragraph 85. Secondly, paragraph 88 contained a suggested clarification of the distinction between effectiveness as between the parties against a debtor and effectiveness as against third parties. Lastly, in connection with article 9, he regretted that an inconsistency with the provisions of article 10 had crept into paragraph 2, in that it suggested that the time of transfer was not the time of assignment but that of the original contract. Such had not been the intention of the Working Group. Article 10 itself concerned the time when a receivable was considered to be transferred. It allowed assignors and assignees to delay a transfer by mutual agreement, including a transfer of future receivables, which in reality did not yet even exist. The commentary on the article, in paragraphs 96 and 97, largely concerned form rather than policy.

The meeting was suspended at 11.25 a.m. and resumed at noon.

40. Mr. ATWOOD (Australia) said that articles 9 and 10 both used the word "transfer" to refer to the concept of assignment; he asked whether that word was synonymous with the word "assignment".

41. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that article 9, paragraph 1, referred to the effectiveness of an assignment, while article 9, paragraph 2, and article 10, referred to a transfer within the meaning of the definition in article 2, namely the creation of rights in receivables as security for indebtedness or other obligation.

42. The CHAIRMAN said that, with regard to statutory limitations on assignments, the wording suggested by the Secretariat was to be found in paragraph 85 of the commentary, in document A/CN.9/470. It was a restatement of the concept that the draft Convention was not intended to override statutory limitations on assignability.

43. Mr. SMITH (United States of America) said that that was one of the points his delegation had made in document A/CN.9/472/Add.3. It would support additional language in article 9 to make it clear that statutory limitations on

assignment other than those referred to in article 9 were not affected by the draft Convention.

44. Mr. MEDIN (Observer for Sweden) said that, if the draft Convention was not intended to affect any statutory limitations on assignment other than those which followed from article 9, it would be a good idea to state that explicitly in the text. He therefore supported the language formulated by the Secretariat.

45. Mr. RENGER (Germany) said that his delegation fully supported the suggestion by the Secretariat. However, there could be difficulties with the interpretation of the word "statutory", which seemed to have a different meaning under some legislations.

46. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the intention was to refer to limitations imposed by law, not by contract. It was believed that the term "statutory" would be clear in most cases.

47. Ms. McMILLAN (United Kingdom) noted the suggestion in paragraph 85 of the commentary that there should be a new provision that would read: "This Convention does not affect any statutory limitations on assignment other than those referred to in article 9." Yet there was no reference to statutory limitations in article 9.

48. Mr. DOYLE (Observer for Ireland) said that he understood the intent but that article 9 did not seem to serve its purpose.

49. Mr. MORÁN BOVIO (Spain) said that his delegation fully supported the Secretariat suggestion. It was important to have a reference to article 9, even though that article did not expressly refer to statutory limitations. In many countries, there were statutory limitations on assignments of future receivables, bulk assignments, and assignments of parts of receivables; the text put forward by the Secretariat was very important because it implicitly stated that under article 9 it would be possible to override those statutory limitations.

50. Mr. SMITH (United States of America) said that his delegation agreed with that point. Similarly, a statute which provided for a contractual restriction on assignment in an original contract, would be inconsistent with articles 11 and 12 of the draft Convention. His delegation therefore believed that the preservation of statutory restrictions on assignments should be taken up by the drafting group so as not to interfere with the existing text of article 9, or the text of articles 11 and 12.

51. The CHAIRMAN said that the matter could be referred to the drafting group.

52. The next issue was effectiveness between the assignor, the assignee and the debtor, as opposed to effectiveness as against third parties.

53. Mr. IKEDA (Japan) sought clarification about the indication in paragraph 84 of the commentary that the draft Convention did not give priority to one creditor over another, but left matters of priority to national law, since in

article 10 the rules of priority were based on the time of the conclusion of the contract of assignment. That meant that a future receivable could take priority under the draft Convention or national law.

54. The CHAIRMAN recalled that the Secretariat had already indicated that, during the drafting process, an inconsistency had emerged between article 9 and article 10.

55. Mr. MORÁN BOVIO (Spain) said that his delegation fully supported the Secretariat's suggestions in paragraph 88 of the commentary, since they improved the text and made it clearer.

56. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Secretariat had felt that it was implicit in articles 11 and 12 that the exception with regard to statutory limitations applied not only to article 9 but also to articles 11 and 12. If it was the wish of the Commission, that point could be made clearer in article 9.

57. With regard to the comments made by the representative of Japan, he recalled that the previous draft of articles 9 and 10 had included wording which made the effectiveness of an assignment subject to the priority rules of the draft Convention. The Working Group had decided to delete that wording, so that, while effectiveness was governed by articles 9 and 10, priority was left to the law of the assignor's location.

58. The purpose of the suggestion in paragraph 88 of the commentary was to make the distinction between effectiveness and priority clearer, and to specify that the effectiveness of an assignment vis-à-vis third parties was left to the law of the assignor's location. It must be ensured that that rule did not extend to the effectiveness of the assignment of future receivables or bulk assignments, which were covered by articles 9 to 12; that was the reason for the second part of the suggestion. The objective, therefore, was to clarify the interplay between effectiveness and priority by ensuring that effectiveness between the assignor and the assignee and as against the debtor was subject to the draft Convention but, with regard to effectiveness as against third parties, priority was left to outside law. A difficulty arose, however, because in some jurisdictions it was not possible to split effectiveness into two parts; the draft Convention therefore needed to be as clear as possible.

59. Mr. WHITELY (United Kingdom) said that the two issues were distinct under the draft Convention and needed to be treated differently; it was to be hoped that the drafting group would find an appropriate formulation. He wondered whether a jurisdiction that did not recognize effectiveness would be likely to have rules of priority.

60. The CHAIRMAN said that the Commission would need to hear from such jurisdictions if it was to take their concerns into account when formulating the provisions of the draft Convention.

61. Mr. SMITH (United States of America) said that some national jurisdictions, when prohibiting assignments of future receivables or bulk assignments, might not distinguish in their domestic law between effectiveness and priority. If,

in such a case, the assignment was effective but priority was left to article 24 of the draft Convention, he wondered how priority would be determined under domestic law. The Working Group had wished to validate bulk assignments and assignments of future receivables, even if that would require a different interpretation or a change in a national law's priority rules that did not recognize those types of assignment. The Secretariat proposal in paragraph 88 was designed to address that issue, and to ensure that a priority rule did not destroy the intent to validate such assignments. His delegation fully endorsed that principle, but found the proposed language imprecise. The United States proposal (A/CN.9/472/Add.3) might address the two issues just discussed, as well as the issue of statutory prohibitions on assignment.

62. Mr. DOYLE (Observer for Ireland) supported the Secretariat proposal in paragraph 88, as it did clear up a possible ambiguity. With regard to the jurisdictional question, he entirely agreed with the previous speaker that the intent of that proposal was clear, and the drafting group could therefore take care of the exact wording. However, his delegation was also willing to look at the alternative language proposed by the United States delegation.

63. The CHAIRMAN noted that paragraph 95 of document A/CN.9/470 suggested that the inconsistency between article 9 (2) and article 10 could be resolved by deleting from article 9 (2) the reference to the time of the conclusion of the original contract of assignment. It also suggested the alternative of redrafting paragraph 9 (2) to make the language consistent with that of article 10.

64. Ms. McMILLAN (United Kingdom) said that her delegation supported the proposal to make the language of article 9 (2) consistent with that of article 10.

65. Mr. DOYLE (Observer for Ireland) said that his delegation preferred the simpler solution of deleting from article 9 (2) the reference to the time of conclusion of the original contract, but could also accept the alternative proposal of making the wording consistent with article 10.

66. Mr. MORÁN BOVIO (Spain) preferred to retain the specific reference to the time of conclusion of the contract of assignment, which would make article 9 (2) easier to understand.

67. Mr. RENGER (Germany) requested the Secretariat to read out the proposed new wording of article 9 (2).

68. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the text, prior to the last change proposed by the Working Group, read as follows: "Unless otherwise agreed, an assignment of one or more future receivables is effective when it arises without a new act of transfer being required to assign each receivable." However, the reference to the time a receivable arose was not intended to address the time of transfer, which was dealt with more clearly and fully in article 10. Article 9 (2) referred to the stipulation that the receivable had to arise in order for an assignment to be effective at the time, with the time being specified in article 10. It was intended to ensure that master agreements covered future receivables without

requiring additional documents. The Secretariat therefore preferred to delete the reference to time in article 9 in order to avoid dealing with the same issue in two different articles.

69. With the proposed deletion, article 9 (2) would read: "Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable."

70. Ms. McMILLAN (United Kingdom) and Ms. WALSH (Observer for Canada) supported the version just proposed by the Secretariat.

71. The CHAIRMAN assumed that the Commission accepted the new wording, subject to consideration by the drafting group.

72. Mr. SMITH (United States of America) said that to a large extent his delegation's proposal with regard to effectiveness as against third parties had already been accepted as a matter of policy by the Commission. Article 9 should not render ineffective any statutory prohibitions on assignments. That was reflected in his delegation's proposed article 9 (5) (A/CN.9/472/Add.3). However, a statute that merely validated contractual restrictions on assignment should not interfere with articles 11 and 12.

73. The Secretariat had proposed language very similar to his delegation's proposed article 9 (3) to make it clear that article 9 dealt with the effectiveness of the transfer between the assignor and the assignee, but did not affect third parties. Reference had been made to the problem of a statute that did not distinguish between effectiveness and priority when it rendered ineffective bulk assignments and assignments of future receivables. The proposed article 9 (4) also addressed that issue.

74. An additional issue was that national law should not prevent an assignment of future receivables or bulk assignments merely because such assignments could not take place under that law. On the other hand, many insolvency regimes under national law provided for different treatment of post-insolvency receivables. As discussed in the Working Group, in the case of a present assignment of future receivables, if the assignor was subject to insolvency proceedings, the insolvency administrator might have rights under national law to claim an interest in the receivables generated by the assignor after the commencement of those proceedings, even though those receivables had been assigned prior to the insolvency. In order to avoid interfering with national law on the treatment of post-insolvency receivables, his delegation had proposed an additional article 9 (6). According to that paragraph, a general law prohibiting future assignments or bulk assignments would not be recognized under the draft Convention, but an insolvency law with respect to post-insolvency receivables that dealt with priority would still be effective.

75. The CHAIRMAN asked the United States delegation to explain the differences between his proposal and the issues raised in that connection by the Secretariat.

76. Ms. WALSH (Observer for Canada) requested clarification from the United States delegation as to the purpose of the proposed paragraph 9 (3).

77. Mr. SMITH (United States of America) said that the proposed paragraph 9 (3) was very similar to the Secretariat's proposal. As a general rule, when article 9 referred to transfer, it was referring to the transfer as between the assignor and the assignee and not necessarily in relation to priority, which was left to article 24. The reason for paragraph (3) was the one indicated by the Secretariat. The key difference between the proposals related to the extent to which a national law that prohibited the assignment of bulk receivables and future receivables was rendered ineffective by the draft Convention. Such a national law would be rendered ineffective to the extent that it was a general law. However, a law that arose out of the insolvency rules of national law would not be rendered ineffective. The difference was primarily in the preservation of the insolvency rules as to future receivables.

78. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said it was not clear whether the differences were a matter of policy or a drafting issue. Effectiveness was covered only as between the assignor and the assignee and he wondered about effectiveness as against the debtor. Once effectiveness had been limited in that way, he did not see how a rule specifying that the assignment was effective as between the assignor and the assignee, even in the case of post-insolvency receivables, would affect the rights of the insolvency administrator or creditors in insolvency. That matter needed to be further clarified. Perhaps it could be addressed by limiting the effectiveness in article 9 to assignment as between the assignor and the assignee and as against the debtor, as proposed in paragraph 88 of document A/CN.9/470.

The meeting rose at 1.05 p.m.